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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 78-150

COLIN M. GONZALES, ET AL.,
Petitioners,

v.

FAIRFAX-BREWSTER SCHOOL, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT FAIRFAX-BREWSTER SCHOOL, INC. and RESPONDENTS RUSSELL L. RUNYON AND KATHERYNE E. RUNYON, D/B/A BOBBE'S PRIVATE SCHOOL, IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Respondent Fairfax-Brewster School, Inc., and respondents Russell L. Runyon and Katheryne E. Runyon, d/b/a Bobbe's Private School, pray that the Petition for Writ of Certiorari be denied.

JURISDICTION

Petitioners' statement as to this Court's jurisdiction to hear the Petition is accepted. These respond-

ents contend, however, that the case does not fall within the guidelines set forth in Rule 19, Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Petitioners' statement of question presented is not acceptable in the form in which set forth because it is argumentative, incomplete, and inaccurate. These respondents would restate the question presented as follows:

Whether the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988), which became effective on October 19, 1976, applies to and has the effect of reversing this Court's express and final disposition of the issue of attorney's fees in a case decided by his Court on June 25, 1976, its mandate affirming the judgment below and awarding costs having been issued on August 11, 1976, filed with the Court of Appeals on August 13, 1976, and filed in the District Court on August 16, 1976.

STATEMENT

This Statement is limited to what these respondents deem necessary to correct inaccuracies and omissions in petitioners' Statement.

On June 25, 1976, the Court in *Runyon* v. *McCrary,* 427 U.S. 160 (1976), held that in their action brought under 42 U.S.C. Section 1981 the petitioners here (who had cross-petitioned there on the attorneys fees issue and one other issue) were not entitled to the award of attorneys fees, the Court following its holding in *Alyeska Pipeline Service Corp.* v. *Wilderness Society,* 421 U.S. 240 (1975). The Court's mandate, affirming the judgment below and awarding costs, was issued on

August 11, 1976, filed with the Court of Appeals on August 13, and filed in the District Court on August 16. Two months later the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. Section 1988), (the Fees Awards Act), became law. The Fees Awards Act contains no language indicating that it is to be applied retrospectively or to "pending" cases, nor does it contain any definitions. However, the legislative history, including the House Committee report and statements of supporters of the legislation during debate in both houses show that it was intended to apply to cases pending on the date of its enactment in accordance with the principles explicated in *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696 (1974).

Ten days after the President signed the legislation petitioners filed their motion for costs, and for attorney's fees in the amount of $43,475.00, in the District Court. That court denied the claim for attorney's fees, stating that the case was substantively final, having been concluded by the United States Supreme Court before the effective date of the Act, and therefore the Act did not apply. The Court of Appeals affirmed the District Court's denial of the claim for attorney's fees. Both courts below acted in accordance with the controlling authorities.

The Court of Appeals, in affirming the District Court's denial of the motion for attorney's fees, correctly distinguished the case chiefly relied upon by petioners—*Bradley*—in which the statutory amendment had become effective while an appeal was awaiting decision in the appellate court, from the instant case, in which the statutory amendment became effective more than two months after this Court's judgment affirming the decision of the court below had been filed in the

District Court. In so doing the Court of Appeals did not, as asserted in petitioners' Statement, construe *Bradley* as holding that a new law such as the Fees Awards Act is applicable only to cases pending on appeal at the time of enactment, as is clear from the following language in its opinion:

> "The award of fees in that case was based upon the well-recognized 'principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.'" (quoting from *Bradley*) (Pet. App. 5a)

ARGUMENT

I

The Decision Below That the Civil Rights Attorney's Fees Awards Act of 1976 Is Inapplicable to This Case Is Clearly Correct

The Court of Appeals' resolution of the question involved here is fully in accord with and compelled by prior decisions of this Court, and especially and most recently the decision of this Court in *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696 (1976). Since further review would not call for the exposition of any principles not already established, without any conflict of decisions, further review is unnecessary.

It is clear from the legislative history of the Fees Awards Act that Congress intended it to apply to cases still pending in the *Bradley* sense, irrespective of when they had been commenced, that is, to cases commenced before the date of enactment which had not been fully decided, or in which the issue of attorneys' fees had not been finally disposed of, before the date of enactment. The decisive and limiting role played by *Bradley* in committee and on the floor in both houses of Congress is indisputable, and this is especially true on the question of what is a pending case to which the Act may be applied.

The House Report declared: "In accordance with the applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. Bradley v. Richmond School Board, 416 U.S. 696 (1974)." HR Rep. No. 94-1558, p 4 n 6 (1976). During debate in the Senate, Senator Abourezk, acting floor manager for the bill, said:

> "The Civil Rights Attorneys' Fees Awards Act authorizes Federal courts to award attorneys' fees to a prevailing party in suits presently pending in the Federal courts. The application of this Act to pending cases is in conformity with the unanimous decision of the Supreme Court in Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974).
>
> "This application is necessary to fill the gap created by the Alyeska decision and thus avoid the inequitable situation of an award of attorneys' fees turning on the date the litigation was commenced." (122 Cong. Rec. S. 17052, 94th Cong. 2nd Sess. (1976, daily ed.)).

During debate in the House, the following colloquy occurred between Congressmen Beard of Tennessee and Anderson of Illinois, both supporters of the bill:

> "Mr. Beard of Tennessee. . . . Is there any retroactive nature of this piece of legislation so far as cases that have been filed in the last several months?
>
> Mr. Anderson of Illinois. . . . it would apply to cases now pending, for the simple reason that if that were not the case, the award of fees would

> depend on the date that the case is filed. I do not think that is the basis on which a determination is made. To that extent, it is retroactive. Pending cases could receive an award of reasonable fees." (122 Cong. Rec. H. 12155, 94th Cong. 2nd Sess. (1976, daily ed.)).

On this same point, Congressman Drinan, who was the member of the Committee on the Judiciary who submitted its Report, and floor manager for the bill, said:

> "I should add also that, as the gentleman from Illinois (Mr. Anderson) observed during consideration of the resolution on S. 2278, this bill would apply to cases pending on the date of enactment. It is the settled rule that a change in statutory law is to be applied to cases in litigation. In Bradley versus Richmond School Board the Supreme Court expressly applied that long-standing rule to an attorney fee provision, including the award of fees for services rendered prior to the effective date of the statute." (122 Cong. Rec. H. 12160, 94th Cong. 2nd Sess. (1976, daily ed.)).

The precise question involved in *Bradley* was one relating to the applicability of an attorneys fee statute to a situation where the propriety of a fee award "was pending resolution on appeal when the statute became law." 416 U.S. at 710. In *Bradley* the question of the propriety of a fee award was in fact pending resolution on appeal in the Court of Appeals for the Fourth Circuit when the statute involved there became law. The contrary is true as to the instant case, where the question of the propriety of a fee award had been considered and resolved in the negative by this Court in *Runyon* v. *McCrary,* 427 U.S. 160, long before the statute involved here became law. The issue of attorneys' fees in *Runyon* was a dead issue when the Fees Awards Act

became law. This Court had decided that issue along with the other issues before it, the time for filing a petition for rehearing had passed, the Court had issued its mandate, and the mandate had been filed in the District Court, all before the Fee Awards Act became law. And it is clear from the opinion in *Bradley* and cases cited in *Bradley* that a finally decided case and issue are not affected by an after-enacted statute. This would be true whether the case had been decided in the district court and the time for appeal had passed, or in the court of appeals and the time for appeal or for filing a petition for certiorari had passed, or in this Court and the time for filing a petition for rehearing had passed. In the instant case there was a final judgment, as in *Linkletter* v. *Walker,* 381 U.S. 618 (1965), which was cited in *Bradley.* These respondents had vested rights of non-liability for petitioners' attorneys' fees as a result of the final decision and judgment in their favor on the issue of attorneys' fees in *Runyon,* not subject to being divested by the after-enacted statute, *McCullough* v. *Commonwealth of Virginia,* 172 U.S. 102, 123 (1898); *Hodges* v. *Snyder,* 261 U.S. 600, 603 (1923). Neither the issue of attorneys' fees nor the merits of the case generally were open for further decision or revision by the District Court after this Court's judgment had been received and filed, the statute not yet having been enacted. Indeed, there was no case or controversy still pending at that stage of the proceedings, and the District Court was without jurisdiction to do any more than execute the mandate as received. *Commissioner* v. *Sunnen,* 333 U.S. 591, 597 (1948); *Center for National Policy Review on Race and Urban Issues* v. *Richardson,* 534 F.2d 351 (D.C. Cir. 1976); *In re Long Island Lighting Company,* 244 F.2d 690 (C.A. 4 1976); *Skouras Theatres Corp.* v. *Radio-Keith-Or-*

pheum Corp., 193 F. Supp. 401, 404 (D.C.S.D.N.Y. 1961). See also *Bradley* v. *School Board of the City of Richmond, supra,* n 16 at 712, where it is noted that in *United States* v. *Schooner Peggy,* 1 Cranch 103, 2 L Ed 49 (1801), the French vessel involved had not been "definitively condemned" by the court below because an appeal from that decision was pending when a treaty with France was signed providing for the return of captured property "not yet definitively condemned," and note 19 in *Bradley, supra,* at 715, where it is stated that in *Thorpe* v. *Housing Authority of the City of Durham,* 386 U.S. 670, 673 (1966), the Court noted, "While the directive provides that certain records shall be kept commencing with the date of its issuance, there is no suggestion that the basic procedure it prescribes is not to be followed in all eviction proceedings that have not become final."

When petitioners filed their motion for attorneys' fees in the District Court they were attempting to commence a new action under the authority of the Fees Awards Act, an action that was simply the repetition of an action that had been finally adjudicated before the Fees Awards Act became law. This suffices to show that their petition is without merit. Moreover, the legislative history of the Act makes it quite clear that Congress had no intention of sanctioning such a plain perversion of the law.

Senator Kennedy, a principal supporter of the legislation, stated during debate: "The bill now before us, Mr. President, does not create any new legal remedies. . ." (122 Cong. Rec. S. 16252, 94th Cong. 2nd Sess. (1976, daily ed.)). In the House the following colloquy occurred between Congressman Railsback, a supporter of the bill, and Congressman Drinan, its floor manager:

> "Mr. Railsback: . . . I would simply like to point out that, as I understand it, it is clearly not the intent of Congress to create a new remedy, but that, rather, this bill would create a remedy only in the event that the courts should in the future determine that an individual may sue under the statutes.
>
> "And the bill does not authorize or statutorily grant any private right of action which does not now exist. At least I feel certain that is our intent. I think we ought to establish that in the Record."
>
> "Mr. Drinan. I concur completely. We do not create any new statutory right of action in the bill today." (122 Cong. Rec. H. 12153, 94th Cong. 2nd Sess. (1976, daily ed.)).

Petitioners have cited *Hutto* v. *Finney,* 57 L.Ed 2d 522 (1978), as supportive of their position. Such is not the case. With respect to this issue, *Hutto* applied the law laid down (or reaffirmed) in *Bradley* in a case where, precisely as in *Bradley,* the question of the propriety of an award of attorneys fees was pending resolution on appeal at the time of enactment of an attorneys fees awards act (the Fees Awards Act) that was intended to apply to Bradley-type pending cases.[1]

A very obvious misreading of the opinion of the court below has led petitioners to attribute to that court a holding that the principles enunciated in *Bradley* apply only to cases that are pending on appeal at the time a new law becomes effective (thus excluding cases

[1] For an interesting and well-reasoned decision in which it was held that the Fees Awards Act is not applicable to a case in which all substantive issues, including the attorneys fees issue, had been resolved by the effective date of the Act, see *Peacock* v. *Drew Municipal Sch. Dist.,* 433 F.Supp. 1072 (N.D. Miss., Greenville Div. 1977).

pending in trial courts or in administrative proceedings). They cite seven cases to demolish this straw man. It would serve no useful purpose to comment on them here.

In attacking what they say was the second erroneous basis for the Court of Appeals' decision, petitioners cite *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1938) and *Perkins* v. *Standard Oil Co.,* 399 U.S. 222 (1970), as presenting virtually the identical issue that is involved here, and upbraid the Court of Appeals for refusing to follow such compelling precedents. But examination of these two decisions discloses that each is readily distinguishable from the instant case and that the distinctions go to the very essence. In *Sprague* the issue of attorneys fees was not before the Court in the earlier proceeding (*Ticonic National Bank* v. *Sprague,* 303 U.S. 406 (1938)), was not considered by it, was not impliedly before it, was not waived, was not mentioned in the opinion or the mandate, and therefore the mandate did not foreclose consideration of that issue by the court below. In the words of Mr. Justice Frankfurter speaking for the Court in the second proceeding:

> ". . . While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues. See Re Sanford Fork & Tool Co., 160 U.S. 247, 40 L.Ed. 414, 16 S.Ct. 291; Ex parte Century Indem. Co., 305 U.S. 354, ante, 216, 59 S.Ct. 239 . . ." 307 U.S. at 168

In *Perkins* also this Court's mandate in the earlier proceeding (*Perkins* v. *Standard Oil Co.,* 395 U.S. 642 (1969)) was silent on the question of attorneys fees, as was its opinion, that issue not being before the Court. Accordingly, on a subsequent review of the case, after

the court below had awarded attorneys fees, the Court noted the absence of this issue in the earlier review and the consequent lack of consideration or reference to it in its earlier mandate, and held that this "left the matter open for consideration by the District Court, to which the mandate was directed." 399 U.S. at 223. Petitioners also cite *Maddrix* v. *Dize,* 153 F.2d 274 (C.A. 4, 1946) as "a decision totally at odds with its holding herein . . ." (Petition, p. 12) Upon examination of *Maddrix* the now familiar pattern emerges. The question of attorneys fees for services performed in the appellate courts in a case brought under a statute which provided for the awarding of attorneys fees to successful plaintiffs was neither raised nor considered in the Court of Appeals or this Court in the earlier proceeding (*Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697 (1945)). The Court's opinion and mandate affirming the judgment below were therefore silent on the subject. After remand, fees for services in the appellate courts were applied for but denied by the District Court which considered itself bound by this Court's mandate. In reversing, the Court of Appeals said:

> ". . . The allowance of an additional fee [for services in the appellate courts] does not disturb or enlarge the judgment to which the Supreme Court has given its sanction. The matter of an additional fee was not considered by that court and consequently the present application does not fall within the rule that on a mandate of affirmance from the Supreme Court the District Court has no power to rescind or modify what has been established but can only record the mandate and proceed with the execution of the decree that has been affirmed. . ." 153 F. 2d at 276.

Finally, petitioners cite *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166 (C.A. 2, 1967), cert. denied, 390 U.S. 956. But that decision is so uniquely different in its facts and circumstances and applicable legal principles that it has no precedential value here, and was not even mentioned in *Bradley.* It involved the invocation by the Court in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964) of the act of state doctrine, by virtue of which the Court declined to rule on the merits in an action involving a claim by an agency of the Castro Government of Cuba to American property which had been confiscated by Castro, and reversed the judgment below which held that the American property had been confiscated in violation of international law. The Court remanded the case for further proceedings in conformity with its opinion. As stated by the District Court to which the case was remanded:

> ". . . The mandate reversed the decision of the Court of Appeals and remanded the case to this court 'for further proceedings in conformity with the opinion of this Court.' The opinion specifically left open to this court the admission of C.A.V. as a party, which is to some extent responsible for the present posture of this case. It stated 'Although we discern no remaining litigable issues of fact in this case, the District Court may hear and decide them if they develop.' 376 U.S. at 408, 439, 84 S.Ct. at 946. Thus, the Supreme Court envisioned that there might be more than merely formal proceedings in this court before judgment could be entered." *Banco Nacional de Cuba* v. *Farr,* 243 F. Supp. 957, 971. (U.S.D.C.S.D.N.Y. 1965).

Subsequent to the decision of the Court and issuance of its mandate in *Sabbatino* the President signed the Foreign Assistance Act of 1964 containing an amendment known as the Hickenlooper Amendment. (Section

301(d)(4) of Public Law 88-633, 78 Stat. 1009, 1013.) The Amendment provided in effect that the act of state doctrine should not be applied by any court to prevent decision on the merits giving effect to the principles of international law in any case arising out of foreign expropriations unless the President should determine that application of the act of state doctrine is required in a particular case by the foreign policy interests of the United States, and should file a suggestion to that effect with the court. The Hickenlooper Amendment ". . . became law after the Supreme Court had remanded . . . [the] case to the trial court but before the trial court had acted upon the merits after the remand." *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166, 178 (C.A. 2, 1967). On this same point, the District Court stated that when the Amendment became law proceedings with respect to the entry of judgment on remand were still pending, and recited in detail the complicated and controverted proceedings that were still going on at the time. *Banco Nacional de Cuba* v. *Farr,* 243 F.Supp. 957, 961-2.

The Court of Appeals in *Banco Nacional* noted that the general mandate rule does not apply to matters left open by the mandate, citing *Sprague* v. *Ticonic National Bank, supra, Ex Parte Union Steamboat Co.,* 178 U.S. 161 (1939), and *In re Sanford Fork & Tool Co.,* 160 U.S. 247 (1895), and expressed its view that "the mandate rule should not cover this novel situation . . ." 383 F.2d at 178.

There were other factors of controlling significance in *Banco Nacional* which clearly distinguish it from the instant case, e.g.: the clearly granted constitutional authority for the assertion of congressional power in the field of foreign relations; the fact that a party does

not have a substantive or vested right in the application of the act of state doctrine, so that it cannot be said that the enactment of the Hickenlooper Amendment affected Banco Nacional's property rights, or created any new rights or liabilities; the fact that the application of the act of state doctrine in favor of Banco Nacional was without regard to the merits of the Bank's claim; the fact that the effect of the application of the act of state doctrine in *Banco Nacional* was similar to that of a successfully pleaded statute of limitations by which a defendant obtains a judgment without the merits of plaintiff's action ever having been reached, and that continuing this analogy, it is well established that modification of statutes of limitation does not create or destroy constitutionally protected property rights in those affected by the changes. All of these factors are fully and ably discussed, with ample citations of authority, in the opinion in the Court of Appeals in *Banco Nacional, supra.* In sum, as to *Banco Nacional,* it is *sui generis,* totally different from the instant case, and of no precedential value to petitioners.

II

Retrospective Application of the Act in This Case Would Be Manifestly Unjust

Assuming *arguendo* that the reasons already stated for denying certiorari, which these respondents believe are so cogent, are nonetheless unavailing, *Bradley* and cases cited in *Bradley* provide further reasons, perhaps more compelling, for denying certiorari in this case. In *Bradley,* 416 U.S. at 716, the Court noted the observation in *Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. 268 (1969), that exceptions to the general rule that a court is to apply a law in effect at the time it renders its decision "had been made to prevent manifest injustice," citing *Greene* v. *United States,* 376 U.S. 149 (1964), and at 717 states that "the Court in *Schooner Peggy* suggested that such injustice could result 'in mere private cases between individuals,' and implored the courts to 'struggle hard against a construction which will, by a retrospective operation, affect the rights of parties.' 1 Cranch, at 110, 2 L.Ed. 49."

Here we have a private case between individuals which at this stage is concerned exclusively with obtaining attorneys fees for one well-known civil rights organization and for a civil rights attorney who as shown in the record below uses the office address of an even better-known civil rights organization, the American Civil Liberties Union. The action was originally instituted under an 1866 civil rights statute never before held to apply to private schools, and which contained no provision for the award of attorneys fees. There was a four-three division in the Court of Appeals on the question of whether the statute applied to private schools and a four-three division as to whether the trial court's findings of fact (including the finding of racial discrimination) were not clearly erroneous. *McCrary* v. *Runyon,* 515 F.2d 1082 (C.A. 4, 1975). There was no finding of obduracy or bad faith on the part of respondents.[2]

In *Runyon* v. *McCrary,* 427 U.S. 160 (1976) the Court divided seven to two as to whether the statute

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[2] On the contrary, in its memorandum opinion and order the District Court said:

> "Punitive damages are not awarded. While the defendants' acts have here been declared improper, insofar as the Court can determine similar acts have not heretofore been so declared. Accordingly, the defendants cannot be said to have acted recklessly or willfully in disregard of clear existing law." *Gonzales et al* v. *Fairfax-Brewster School, Inc.,* 363 F.Supp. 1200, 1205, n. 5 (U.S.D.C.E.D. Va. 1973).

applied. Mr. Justice Powell, a member of the majority, wrote a concurring opinion in which he indicated that he did not feel free to disregard recent precedents holding that the statute was applicable to private contractual choices, but that if the slate were clean he might well be inclined to agree with Mr. Justice White (who wrote the dissenting opinion, in which Mr. Justice Renquist joined) that the statute was not intended to restrict private contractual choices. Another member of the majority, Mr. Justice Stevens, wrote a concurring opinion in which among other things he stated that he firmly believed that the line of authority (commencing with *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968)) holding the statute applicable to private racial discrimination was incorrectly decided; that that construction of the statute would have amazed the legislators who voted for it; that since the legislative history discloses an intent not to outlaw segregated public schools at that time, it was quite unrealistic to assume that Congress intended the broader result of prohibiting segregated private schools; and that were the Court writing on a clean slate he would vote to reverse. However, taking into account the interest in stability and orderly development of the law, the change in the national policy as formulated by Congress regarding racial discrimination since the day of the Congress that enacted the statute, and the significant step backwards contrary to his understanding of the *mores* of today which would result if the Court should overrule *Jones*, with effects that would not have arisen from a correct decision in the first instance, he concluded that it was entirely correct for the Court to adhere to *Jones*.

Returning to *Bradley*, the Court said:

> "The second aspect of the Court's concern that injustice may arise from retrospective application of a change in law relates to the nature of the rights effected by the change. The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional. . . ." 416 U.S. at 720

The Court cited *Greene* v. *United States, supra; Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141 (1944); and *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190 (1913). Although in *Bradley* no such matured or unconditional right existed to bring it within the manifest injustice exception, the contrary is true here. The Court's judgment in *Runyon* freed these respondents from all liability for petitioners' attorneys' fees. Retrospective application of the Act would snatch this freedom away and expose respondents to liability not only for petitioners' attorneys fees of $43,475.00 already claimed in the District Court but also for fees for this second journey through the Federal courts, all to be added to fees for their own counsel incurred in what to respondents has been a nightmarish experience now well into its sixth year. As stated in *Bradley*, a third concern of the Court as to injustice that may arise from retrospective application of a change in law "stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." 416 U.S. at 720. Retrospective application here would be in disregard of that concern.

To apply the Fees Awards Act retrospectively in this case would victimize these two small schools unjustly, indeed cruelly.

CONCLUSION

The decision below is clearly correct. There is no conflict of decisions. No questions of general importance are involved requiring review. The Petition should, therefore, be denied.

Respectfully submitted,

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